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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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9 STEPHEN DUANE CHIARA, )  
10 Plaintiff(s), ) No. C 11-5722 CRB (PR)  
11 v. ) ORDER  
12 T. HAUGER, et al., )  
13 Defendant(s). )  
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15 Plaintiff, a prisoner at the Humboldt County Jail (HCJ) in Eureka,  
16 California, filed a pro se Second Amended Complaint (SAC) under 42 U.S.C. §  
17 1983 alleging that on three separate occasions mail room staff improperly refused  
18 his incoming mail on grounds that it was gang related.

19 Per order filed on November 7, 2012, the court found that, liberally  
20 construed, plaintiff's allegations state a cognizable § 1983 claim for violation of  
21 the First Amendment against HCJ mail room officers T. Hauger and S. Beck, and  
22 ordered the United States Marshal to serve these two defendants.

23 Defendants have filed a motion for summary judgment under Federal Rule  
24 of Civil Procedure 56 on the grounds that (1) plaintiff did not exhaust his  
25 administrative remedies and (2) defendants did not violate plaintiff's  
26 constitutional rights. They have accompanied the motion by the requisite Rand  
27 notice of what is required of plaintiff in order to oppose a motion for summary  
28 judgment.

1 Defendants' motion for summary judgment properly raises their claim that  
2 they are entitled to judgment as a matter of law because there is no evidence that  
3 defendants had any involvement in the alleged violations. But it is well  
4 established that a nonexhaustion defense should be raised in an unenumerated  
5 Rule 12(b) motion rather than in a motion for summary judgment. Wyatt v.  
6 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). In deciding such a motion – a  
7 motion to dismiss for failure to exhaust nonjudicial remedies – the court may  
8 look beyond the pleadings and decide disputed issues of fact. Id. at 1119-20.  
9 Consequently, such a motion requires its own notice as to what plaintiff must do  
10 in order to oppose the motion. A Rand notice about summary judgment  
11 procedures will not suffice. See Stratton v. Buck, 697 F.3d 1004, 1008-09 (9th  
12 Cir. 2012).

13 In order to expedite these proceedings, the court will treat defendants'  
14 nonexhaustion defense as a motion to dismiss for failure to exhaust nonjudicial  
15 remedies and hereby gives plaintiff the requisite notice of what he must do to  
16 oppose the motion:

17 Plaintiff is advised that a motion to dismiss for failure to exhaust available  
18 administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your  
19 case, albeit without prejudice. You must "develop a record" and present it in  
20 your opposition in order to dispute any "factual record" presented by the  
21 defendants in their motion to dismiss. Wyatt, 315 F.3d at 1120 n.14. You have  
22 the right to present any evidence to show that you did exhaust your available  
23 administrative remedies before coming to federal court. Such evidence may  
24 include: (1) declarations, which are statements signed under penalty of perjury by  
25 you or others who have personal knowledge of relevant matters; (2) authenticated  
26 documents – documents accompanied by a declaration showing where they came  
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1 from and why they are authentic, or other sworn papers such as answers to  
2 interrogatories or depositions; (3) statements in your complaint insofar as they  
3 were made under penalty of perjury and they show that you have personal  
4 knowledge of the matters state therein. In considering a motion to dismiss for  
5 failure to exhaust, the court can decide disputed issues of fact with regard to this  
6 portion of the case. Stratton, 697 F.3d at 1008.

7 Plaintiff shall file an opposition, or statement of non-opposition, to  
8 defendants' motion for summary judgment and motion to dismiss for failure to  
9 exhaust administrative remedies by no later than January 31, 2013. Defendants  
10 shall file a reply to any opposition within 15 days thereafter.

11 SO ORDERED.

12 DATED: Jan. 3, 2013



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14 CHARLES R. BREYER  
15 United States District Judge  
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